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No. 75-175

In the Supreme Court of the United States

OCTOBER TERM, 1975

JOHN IKE GRIFFITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner claims that the district court erred in denying his application for relief under 28 U.S.C. 2255 and in not granting him an evidentiary hearing on his application.

Following a jury trial in the United States District Court for the Northern District of Alabama, petitioner was convicted of one count of conspiracy to use the United States mails to defraud, in violation of 18 U.S.C. 371, and five counts of mail fraud, in violation of 18 U.S.C. 1341.[1] He was sentenced to concurrent

[1] Petitioner had been a practicing attorney in Alabama. "The convictions were based on substantial evidence that [petitioner], with others, fraudulently and through the use of the mails pro-

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terms of five years' imprisonment on the first three counts of the indictment and concurrent terms of three years' probation on the other three counts, the period of probation to begin upon his release from custody; he was also fined $10,000. The court of appeals affirmed. *United States* v. *Griffith,* 453 F. 2d 1207 (C.A. 5), certiorari denied, 406 U.S. 957.

Petitioner then filed a motion to have his sentence vacated pursuant to 28 U.S.C. 2255. Initially, a United States Magistrate considered the matter and filed a report and recommendation, recommending to the district court that the relief requested should be denied.[2] The district court adopted and approved the report and recommendation of the Magistrate and denied relief without an evidentiary hearing (Pet. App. A5). The court of appeals affirmed (Pet. App. A6–A7).

1. Petitioner contends (Pet. 8–9) that there was an intentional delay by the government in returning the indictment, which was not filed until several years after the government first obtained knowledge of the fraud.

The indictment was returned by the grand jury on August 20, 1970. The conspiracy count charged a series of continuing violations from August 1965 to within eight days prior to the return of the indictment. The five substantive counts all related to offenses com-

cured illegal divorces in Alabama for non-residents." *United States* v. *Griffith*, 453 F. 2d 1207, 1208 (C.A. 5), certiorari denied, 406 U.S. 957. Co-defendant French O. Whitten, Jr., pleaded guilty prior to trial, while co-defendants Ann Love and Shirley Bowman entered pleas of *nolo contendere.*

[2] The report and recommendation of the United States Magistrate is included as an appendix to this memorandum.

mitted in 1969 or 1970 (App., *infra,* pp. 15–16). Moreover, all the acts charged were alleged to have occurred well within the applicable statute of limitations, 18 U.S.C. 3282. Petitioner has not shown any intentional delay by the government to gain a tactical advantage, nor has he demonstrated actual prejudice in the conduct of his defense caused by the delay. His contention is therefore without merit. See *United States* v. *Marion,* 404 U.S. 307, 323–326.

2. Petitioner argues (Pet. 18–19) that he received a harsher punishment than did his co-defendants because he chose to go to trial rather than enter a guilty plea.

The sentence imposed by a district court is generally not reviewable if it is within the statutory limits. *Gore* v. *United States,* 357 U.S. 386. Here, the sentence imposed, five years' imprisonment, three years' probation, and a $10,000 fine was well within the statutory limits provided by law. The record contains no indication that the trial judge considered impermissible factors in imposing this concededly lawful sentence. Nor is there any support in the record for petitioner's speculative contention that the trial judge increased petitioner's punishments because he did not enter a plea of guilty as did his co-defendants. In the absence of an articulated expression by the trial court that it considered impermissible factors in arriving at its disparate sentences between co-defendants, appellate review is unavailable. See *United States* v. *Tucker,* 404 U.S. 443, 446–447; *Williams* v. *Illinois,* 399 U.S. 235, 243; *United States* v. *Bristol,* 473 F. 2d 439, 445 (C.A. 5).

3. Petitioner alleges (Pet. 21–23) that the testimony of government witnesses Sue Cook and Shirley Bowman, both former secretaries in petitioner's office, was "colored" because they were under indictment or threat of indictment.

As the district court concluded, however, the fact that two witnesses who testified were threatened with or were under indictment is a matter that goes only to the weight of their testimony (App., *infra,* p. 17). The record reflects that both witnesses were available for cross-examination and impeachment, and Bowman was extensively examined by counsel for petitioner as to her status as a defendant.[3] In any event, as the court of appeals originally found, the testimony of at least thirteen other witnesses provided overwhelming evidence of petitioner's guilt. *United States* v. *Griffith, supra,* 453 F. 2d at 1208.

4. Petitioner claims (Pet. 19–20) that evidence was admitted at trial that was obtained through illegal electronic surveillance. However, he offers no facts or circumstances to support this allegation, nor does he specify what trial evidence was obtained illegally. Moreover, petitioner filed a motion before trial requesting the right to inspect notes, logs and transcriptions of any electronic or mail surveillance conducted by the government. The trial court denied petitioner's motion, and petitioner chose not to raise the issue on direct appeal (App., *infra,* pp. 17–18).

[3] Petitioner also contends (Pet. 22–23) that Bowman and Cook may have testified falsely, but he presents no factual support for this allegation.

Therefore the contention may not be made now. See *Kaufman* v. *United States,* 394 U.S. 217, 223 and n. 7.

5. Relying on *United States* v. *Maze,* 414 U.S. 395, petitioner contends (Pet. 24–26) that his use of the mails in obtaining Alabama divorces for non-residents was incidental to such activities and thus did not constitute a violation of federal law.

Petitioner did not raise this issue on direct appeal. Moreover, the precise issue was decided by the Fifth Circuit in *United States* v. *Edwards,* 458 F.2d 875, 882–883, certiorari denied *sub nom. Huie* v. *United States,* 409 U.S. 891, a case so identical to petitioner's that the district court found it dispositive here (App., *infra,* p. 18). In *Edwards,* as here, the defendants claimed that there was no solicitation by mail; that the fraud occurred during the meetings in their offices; and only after the fraud was accomplished were the mails used incidentally to send the purported divorce decrees. In holding that such a mailing was in furtherance of the scheme and not merely incidental thereto, the court said (458 F.2d at 883):

> [S]ending the purported divorce decree was a final step in the scheme to defraud, necessary to avoid detection and to prevent the recovery of money lost by the victims and was thus a material part of the fraudulent scheme.

This case is wholly unlike *United States* v. *Maze, supra,* in which this Court held that 18 U.S.C. 1341 did not proscribe a credit card scheme in which the accused used a stolen credit card and his fraud consisted solely of obtaining goods and services by misrepresent-

ing himself as the legitimate holder of the card. The defendant in *Maze* did not use the mails himself, nor did their use by others, though predictable, in any way further the execution of his fraudulent scheme. The only use of the mails was by the establishments that accepted the credit card in payment for services when, in order to receive payment, they mailed sales slips to the company which had issued the credit card. The Court held that such subsequent mailings were not "for the purpose of executing [the] scheme or artifice" (18 U.S.C. 1341) and therefore were not "sufficiently closely related to respondent's scheme to bring his conduct within the statute" (414 U.S. at 399).

Here, in contrast to *Maze,* transmission of the divorce decrees through the mails was an integral part of the scheme; for without the use of the mails to defraud, petitioner's scheme could not have been realized.

6. Petitioner urges that the district court erred in denying his motion to have United States District Judge Clarence W. Allgood disqualify himself from hearing petitioner's Section 2255 motion for personal bias.[4]

The affidavit accompanying petitioner's recusal motion simply alleges that Judge Allgood is a member

[4] Petitioner also filed two other motions which appear to raise the same bias claim against any United States district judge to whom his petition might be assigned and who is also a present or past member of the Birmingham or Alabama Bar Associations. The district court did not consider these because they were not verified by affidavit, as required by 28 U.S.C. 144 (App., *infra*, p. 12).

of the Birmingham and Alabama Bar Associations, which, petitioner says, were the primary moving forces behind his prosecution and conviction (Pet. App. A9–A10). Petitioner has neither alleged nor shown any specific acts or circumstances to demonstrate that Judge Allgood had any personal interest in the outcome of the case or personal enmity toward petitioner. While membership in an organization such as a bar association might give rise to a personal interest in furthering the goals of that organization, membership alone is not sufficient to show bias. Petitioner has failed to demonstrate the kind of "personal bias or prejudice either against him or in favor of any adverse party" required by the statute. See 28 U.S.C. 144.

7. Since petitioner's contentions are conclusively refuted by the record and files of the case, the district court properly [5] refused to grant a hearing. *Sanders* v. *United States,* 373 U.S. 1.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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[5] Petitioner contends that he was denied the effective assistance of counsel because the trial court denied a continuance motion when one of his attorneys became ill and was unable to attend the trial for two and one-half days (Pet. 11–12). He also alleges that the trial court erred by denying his motion to suppress evidence seized under an allegedly defective search warrant (Pet. 14–17). Both contentions were considered by the court of appeals on petitioner's direct appeal and found to have no merit whatsoever. *United States* v. *Griffith, supra,* 453 F. 2d at 1208.

APPENDIX

United States District Court for the Northern District of Alabama, Southern Division

No. CA 74-A-636-S

JOHN IKE GRIFFITH

v.

UNITED STATES OF AMERICA

ORDER

The Court has considered the motion filed by John Ike Griffith pursuant to 28 U.S.C. § 2255 and the report and recommendation of the United States Magistrate. The Magistrate's recommendation is hereby ADOPTED and APPROVED.

It is therefore ORDERED that the motion of John Ike Griffith to vacate and set aside the conviction in criminal action 70-282-S be and the same hereby is DENIED.

The Clerk is directed to furnish Movant, in care of Box 147, Route 1, Dutton, Alabama and the United States Attorney, Northern District of Alabama with a copy of the Magistrate's report and recommendation and this Order.

DONE, this 7th day of November, 1974.

_____,

U.S. District Judge.

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United States District Court for the Northern District of Alabama, Southern Division

No. CA 74–A–635–S

JOHN IKE GRIFFITH

v.

UNITED STATES OF AMERICA

EXAMINATION, REPORT AND RECOMMENDATION TO THE UNITED STATES DISTRICT COURT

Movant was convicted in this Court on April 16, 1971 on one count of violation of Title 18, U.S.C. § 371, conspiracy to use the United States mails to defraud and on five specific counts of violation of Title 18, U.S.C. § 1341, use of the United States mails to defraud. He was subsequently sentenced to imprisonment for a period of five years and fined $10,000 under Count One of the indictment and was sentenced to five years imprisonment under each of Counts Two and Three, said sentences to run concurrently with the sentence under Count One; three years probation under each of Counts Four, Five and Six, such three year periods of probation to be served concurrently and to begin upon his release from custody. He was also taxed with the cost in the case amounting to some $5,226.16. In due course, his appeal was perfected to the United States Court of Appeals for the Fifth Circuit which affirmed on January 20, 1972. *U.S.* vs. *Griffith,* 453 F. 2d 1207, 5th Cir. (1972), Cert. den. 92 S. Ct. 2059, 406 U.S. 957. On June 26, 1974, he filed his motion in this Court pursuant to Title 28, U.S.C. § 2255 and included therewith a forty-two page document which he has entitled "Memorandum of Law in Support of: Motion to Vacate Sentence. Grant a New Trial or Discharge Petitioner From Custody Pursuant to Section 2255, Title 28, U.S.C." Upon careful scrutiny, it is found that this additional document contains certain allegations which Movant apparently wishes the Court to consider in support of his motion. Contemporaneously with the above, he has filed three motions, the thrust of which appear to be that any United States district judge to whom his motion might be assigned and who is also a present or past member of the Birmingham Bar Association or the Alabama Bar Association, should disqualify himself from these proceedings on the ground that as a member, past or present, of either the Birmingham or the Alabama Bar Associations, he has such a personal interest in the outcome of these proceedings as to make it unfair to the Movant for such judge to sit. The Magistrate will consider all the above motions and the memorandum as one integrated request for post-conviction relief and will treat them as such herein.

Movant asserts that he has previously filed a motion under Section 2255 in the United States District Court for the Northern District of Texas, which said motion was denied. The Magistrate is uninformed of the grounds alleged in the previous motion. However, since the statute requires that such a motion be filed in the court which imposed the sentence, the Magistrate will consider that the motion was dismissed there as having been brought in the wrong district and not on the merits.

On June 28, 1974, Magistrate R. Macey Taylor, entered an Order requiring the Respondent to show cause why the relief requested by the Movant should not be granted. The Respondent has filed its answer and Movant has since filed a traverse. Such response and traverse will be considered herein.

The means by which a litigant may raise the issue of a judge's personal bias either against him or in favor of an opposing party is provided by statute, 28 United States Code § 144. In substance, the statute requires that a party believing that the judge sitting in his case is biased, must file an affidavit stating his belief and setting forth the facts and reasons which give rise to such belief and must be accompanied by a certificate of counsel of record to the effect that such affidavit is filed in good faith. The Movant herein has filed three separate motions, all of which in one form or another, attempt to raise the issue of judicial bias. Only one of such motions is verified by affidavit, and thus is the only one which will be treated here. This motion specifically requests that the Honorable Clarence W. Allgood, United States District Judge, disqualify himself for personal bias. It alleges that Judge Allgood is a member of the Birmingham Bar Association and of the Alabama Bar Association and that such Bar Associations were the primary moving forces which led to his prosecution and conviction. The affidavit is insufficient on its face in that it alleges nothing more than that Judge Allgood was a member of the stated Bar Associations. The Movant in no way attempts to show, other than by mere conclusion, that Judge Allgood has any personal interest in the out-

come of this proceeding. While membership in an organization, such as a Bar Association, might give rise to a personal interest of a judge in furthering the goals of that organization, membership alone is not sufficient to show such personal interest. Specific acts or circumstances must be shown which would give rise to such bias.

Were the Movant able to overcome the rather obvious deficiencies in his affidavit, his attempt to raise this issue is subject to an even more devasting defect. The statute clearly requires that the affidavit be accompanied by a certificate of the counsel of record for the party making the affidavit that such affidavit is filed in good faith. Since the Movant appears here pro se, he presumably could make the certificate himself but he has failed to do so and for that reason, if for no other, the Magistrate finds that the attempt of the Movant to raise the issue of judicial bias is insufficient and it should be denied.

Though Movant has failed to clearly delineate the issues which he wishes to have considered, a careful reading of his motion reveals several issues which the Magistrate will attempt to treat here. They are: (1) That he was denied effective assistance of counsel in that the trial court denied his motion for a continuance when one of his trial counsel became ill and was unable to attend the trial for a period of some two days. (2) That he was denied due process of law in that there was an inordinate delay in bringing the indictment against him, to his prejudice. (3) That the fruits of illegal searches and seizures were introduced against him in violation of his Fourth Amendment

rights to be free from unreasonable searches and seizures. (4) That his activities in obtaining Alabama divorces for non-residents of the State of Alabama were legal in that he obtained valid divorces for such non-residents and such divorces being valid, that no fraud was committed. (5) That he received a harsher punishment than did his codefendants for no reason other than that he chose to go to trial rather than to enter a plea of guilty. (6) That the testimony of two witnesses was "colored" because they, themselves, were in danger of prosecution for acts in furtherance of the scheme or conspiracy charged to this Movant. (7) That evidence was admitted against him which was obtained by illegal surveillance or illegal "bugging" or illegal electronic devices in violation of law and in violation of his Fourth Amendment right to be free from illegal searches and his Fifth Amendment right against self-incrimination. (8) That use of the mails in his activities in obtaining Alabama divorces for non-residents was incidental to such activities and thus did not constitute a violation of the law.

As to issues enumerated as (1) and (3) above, it need only be said that these issues were considered by the United States Court of Appeals for the Fifth Circuit and determined against the Movant. *U.S.* vs. *Griffith,* supra.

Movant complains that facts upon which the indictment, prosecution and conviction were based were known to prosecutors as early as 1965 and that such porsecutors purposefully delayed the indictment, to his prejudice. It is enough to say that if such allegations could be sustained, this ground was available to

Movant at the trial of his case and on appeal to the United States Court of Appeals for the Fifth Circuit. The record reveals that Movant, acting through counsel, filed a motion to dismiss the indictment on September 28, 1970 wherein, seventeen separate grounds were cited as a basis for dismissing such indictment but this ground was not among them. This issue was not raised on appeal. Section 2255 provides for a collateral attack on a judgment of conviction and is not a substitute for appeal for alleged errors committed at or before the trial. Belated suggestions of possible prejudice in such instances are not favored on collateral attack especially following a full review on appeal. *Eisner* vs. *U.S.,* 351 F. 2d 55, 6th Cir. (1965); *Houston* vs. *U.S.,* 419 F. 2d 30, 5th Cir. (1969).

The indictment upon which Movant was convicted was returned by the Grand Jury on August 20, 1970. Count One alleged a conspiracy in violation of 18 U.S.C. § 371 with numerous overt acts in furtherance of said conspiracy, one of which occurred on August 14, 1970, eight days prior to the indictment. Count Two of said indictment charged a violation on 3 December 1969, some eight and one-half months prior to the date of the indictment. Count Three charged a violation on March 18, 1970, some five months prior to the indictment. Count Four charged a violation on the 22nd day of January 1970, some eight months prior to the indictment. Count Five charged a violation on 3 July 1969, some fourteen months prior to the indictment. Count Six charged a violation on 18 July 1970, approximately one month prior to the indictment. All acts charged in the indictment, and

in each count thereof were alleged to have occurred on specific dates well within the applicable statute of limitations, 18 U.S.C. § 3282. Assuming there was a delay in bringing the indictment, a fact which is demonstrably false, such a delay does not amount to a violation of Movant's constitutional rights so long as the applicable statute of limitations period is followed and no prejudice is shown. *U.S.* vs. *Edwards,* 458 F. 2d 875, 5th Cir. (1972); *U.S.* vs. *Marion,* 404 U.S. 307, 92 S. Ct. 455, 30 L. Ed. 2d 468 (1971); *U.S.* vs. *Ewell,* 383 U.S. 116, 86 S. Ct. 773, 15 L. Ed. 2d 627 (1966); *U.S.* vs. *Judice,* 457 F. 2d 414, 5th Cir. (1972); *U.S.* vs. *Grayson,* 416 F. 2d 1073, 5th Cir. (1969); Cert. den., 396 U.S. 1059, 90 S. Ct. 754, 24 L. Ed. 2d 753 (1969); *Bruce* vs. *U.S.,* 351 F. 2d 318, 5th Cir. (1965), Cert. den., 384 U.S. 921, 86 S. Ct. 1370, 16 L. Ed. 2d 441 (1966).

Movant's contentions enumerated in issue number (4) above were extensively treated by the U.S. Court of Appeals for the Fifth Circuit in *U.S.* vs. *Edwards,* supra, in a case which is so similar in facts as to be completely applicable to Movant's contentions herein. There, the Fifth Circuit Court of Appeals decided the issue contrary to the claims of the Movant.

Movant was convicted on all six counts of the indictment on evidence which the Court of Appeals for the Fifth Circuit described as "overwhelming." Upon such conviction, he was subject to maximum imprisonment totalling thirty years and fines totalling fifteen thousand dollars. He, in fact, received a prison sentence of five years, three years probation and a fine of ten thousand dollars. His total punishment was well

within the maximum provided by law. It may be assumed that the trial court considered the nature and degree of the illegal acts of the Movant as well as his personal circumstances in imposing sentence and the fact that his sentence was more severe than the sentence imposed upon a codefendant who entered a plea of guilty, is no basis for disturbing the action of the Court at this time.

The fact that two witnesses who testified against the Movant at his trial were under indictment or threat of indictment, is a matter which goes to the weight to be given their testimony by the jury. The record reflects that both witnesses were available for cross-examination by counsel for the Movant and that, in fact, witness Shirley Bowman was questioned as to her status as a defendant by both defense counsel and counsel for the prosecution. It is not now known what, if any, weight was given to the testimony of these two witnesses by the jury but such testimony is not due to be stricken now. It might be noted once again that in affirming, the Court of Appeals noted that the evidence against this Movant was "overwhelming."

Movant, for the first time, makes the general assertion that evidence was admitted at trial which was obtained through illegal surveillance or illegal "Bugging" or illegal electronic devices in violation of the law. This allegation is a bare conclusion. He alleges no facts or circumstances which would tend to support the allegation and in no way informs the Court of any particular evidence to which he makes reference. On September 28, 1970, acting by and through his counsel, Movant filed a motion which was

entitled "Motion to Produce for Inspection" by which he asked to inspect and to copy, among other things, the following:

> 10. Notes, logs and/or transcriptions of any and all electronic surveillance conducted by any officer or agent of the United States during investigation resulting in the indictment in this case, or copies thereof, within the possession, custody or control of the Government, the existence of which is known, or by the exercise of due diligence may become known to the attorney for the Government.
>
> 11. Any and all logs, notes, memoranda, copies, photographs of any surreptitious surveillance of the United States mails in connection with the investigation resulting in the indictment in this case, within the possession, custody or control of the Government, the existence of which is known, or by the exercise of due diligence, may become known to the attorney for the Government.

The question as to the existence or use of surveillance or "bugging" or use of electronic devices was judicially determined during the pretrial proceedings. If there was error, such error was available to the Movant on his appeal. He chose not to raise that issue on appeal and as was said above, a motion under Section 2255 is not a substitute for an appeal.

As to Movant's contention that use of the mails was incidental to his activities in obtaining Alabama divorces for non-residents of the State of Alabama, that question was also treated in *U.S.* vs. *Edwards,* supra, and it should suffice to say that the position taken by the Movant here was not sustained by the U.S. Court of Appeals for the Fifth Circuit.

Having carefully and thoroughly considered all the issues raised by the Movant and for the reasons above-stated, the Magistrate is of the opinion and recommends that the relief requested by the Movant should be denied.

DATED, this _____ day of October, 1974.

EDWIN L. NELSON,
U.S. Magistrate.

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